

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT WAITAKERE**

**I TE KŌTI WHĀNAU
KI WAITĀKERE**

**FAM-2020-090-000276
FAM-2020-090-000395
[2021] NZFC 3657**

IN THE MATTER OF THE PROPERTY (RELATIONSHIPS) ACT
1976

IN THE MATTER OF FAMILY PROTECTION ACT 1955

BETWEEN [JESSICA RERE]
Applicant

AND [MICHELLE CAMPBELL]
As executor and trustee of the estate of
[Ralph Campbell]
First Respondent

AND [MICHELLE CAMPBELL]
[LESTER CAMPBELL]
As beneficiaries
Second Respondents

Hearing: 19 March 2021

Appearances: B Hayes for the Applicant
J Libbey for the First Respondent
A Kalinowski for the Second Respondents
S Jefferson QC as Lawyer to Assist

Judgment: 26 April 2021

RESERVED JUDGMENT OF JUDGE T H DRUCE
[Litigation capacity]

Introduction

[1] The applicant, Ms [Rere], commenced these Property (Relationships) Act and Family Protection Act proceedings in May last year. She claims she was in a long-standing de facto relationship with the deceased, [Ralph Campbell], at the date of his death.

[2] [Ralph] died [in mid-October] 2019, leaving his last will dated 02 October 2019. Probate was granted on 16 December 2019. The will appoints his daughter, [Michelle], as his sole executor and trustee. After providing for various bequests, the will provides for the residue to be divided into three equal parts:

- One part to [Michelle];
- One part to his son, [Lester];
- One part to be held by the trustee *“for the benefit of my friend [Jessica Rere] during her lifetime. I direct my trustee to pay or apply such part or parts of the capital and income to [Jessica Rere] for her care, welfare and comfort with such payments to be made to her at my trustee’s absolute discretion. Following the death of [Jessica Rere] I direct my trustee to hold any remaining funds from this part upon trust to be distributed equally between my biological grandchildren [who are then named] who have survived [Jessica Rere] and to be paid upon their attaining the age of 25 years.”*

[3] The applicant and respondents have filed extensive affidavit evidence addressing the nature of the relationship between [Ralph] and the applicant. Faced with impending settlement discussions and/or a judicial settlement conference, the applicant’s lawyer, Mr Hayes, developed concerns as to the applicant’s capacity to

adequately instruct him on the more complex factors that needed to be taken into account when considering the strengths and weaknesses of the applicant's cases and the likely risks and benefits associated with the ongoing litigation.

[4] He explored her understanding of the issues by way of a series of questions, recording her answers. He formed the view that she did not have the capacity necessary to give him sufficient instructions to compromise the proceedings or advance the litigation to hearing. He then took steps to raise the issue with the court and he also obtained expert evidence from a psychiatrist, Dr Thaldessai. The court also appointed Mr Jefferson QC as counsel for assist and the matter was set down for hearing.

[5] At the hearing, Dr Thaldessai was cross-examined and the applicant herself gave evidence and was cross-examined. The psychiatrist's evidence is recorded in 13 pages of notes of evidence, the applicant's evidence in eight pages.

The law

[6] Rule 8 of the Family Court Rules 2002 provides:

incapacitated person means a person who, by reason of physical, intellectual, or mental impairment, whether temporary or permanent, is—

- (a) not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings; or
- (b) unable to give sufficient instructions to issue, defend, or compromise proceedings

[7] This rule is worded identically with r 4.29 of the District Court Rules 2014.

[8] In *Corbett v Patterson*, the Court of Appeal summarised the relevant considerations as follows:¹

- (a) The burden of proof is on the party asserting incapacity, on the balance of probabilities standard.

¹ *Corbett v Patterson* [2014] NZCA 274.

- (b) The inquiry should focus on the subject party's role in the specific litigation at issue. The complexity of that litigation will be relevant to the assessment.
- (c) Capacity is to be judged in relation to the decision or activity in question and not globally.
- (d) Something more is required than the mental competence of understanding, in broad terms, what is involved in the decision to prosecute, defend or compromise the proceedings. The person must be able to understand the nature of the litigation, its purpose, its possible outcomes and its risks (including the prospect of an adverse costs award).
- (e) The fact that the subject party is vulnerable to exploitation or prone to irresponsible decisions may be relevant, but it does not necessarily follow that the party is unable to understand the issues or give sufficient instructions.
- (f) When assessing the capacity to give instructions to counsel, the test is whether the subject party is capable of understanding the issues of which his or her consent or decision is likely to be necessary, with the assistance of such proper explanation from legal advisers, and experts in other disciplines, as the case may require.
- (g) The appointment of litigation guardian is not to be likely undertaken since such an appointment will see the litigant, often involuntarily, surrendering the control of the proceedings to the litigation guardian including the right to discontinue or compromise/settle the claim.
- (h) The fact that a party is difficult or acting foolishly is not, of itself, grounds to mandate appointment of a litigation guardian. Nor should the fact that the appointment of a litigation guardian would be convenient to the court (and other parties) be a consideration.

- (i) Control of a litigant whose conduct/behaviour is seen as impeding the process of management of the matter can be undertaken by a variety of other options available to the presiding judge.

Findings

[9] Dr Thaldessai prepared a report dated 09 March 2021. He confirmed that, in his opinion, Ms [Rere] does suffer a degree of impairment. While he could not be sure as to causation, his opinion was that the most likely cause was her chronic schizo-affective disorder. I summarise his more particular findings:

- (a) Ms [Rere] showed only mild cognitive impairment when assessed using the Addenbrooke's Cognitive Examination (ACE-III NZ version revised 2014). Her total score was 87 out of 100.
- (b) She demonstrated limited insight into her illness.
- (c) Based on her medical records (for the period from 2019) her mental health has been stable throughout the period of these proceedings with no acute relapse in her illness over this time period.
- (d) Her illness is treated and managed with a range of some seven psycho-active medications including clonazepam, risperidone, flupenthixol decanoate (by monthly injection), sodium valproate and zopiclone.
- (e) She is not experiencing "positive" or acute symptoms of illness.
- (f) Between 50-70 per cent of people with chronic psychosis, such as the applicant, experience some degree of executive function deficits. These relate to "judgment, complex planning, complex decision-making and so on". He was unable to clinically confirm any such deficits in his assessment as, in his opinion, this would require a neuro-psychological assessment.

- (g) Ms [Rere] told him that she could not remember any of the details of [Ralph]'s will, but believed that she had a claim to a half share of the estate and linked this with being in a de facto relationship with [Ralph] for 25 years. Given that she scored 24 out of 26 in the memory component of the ACE-III test which covers both short and long-term memory, her difficulties in describing the will were probably not due to poor memory.
- (h) She was unable to understand the relevance of her historical WINZ benefit applications to her case.
- (i) When asked questions about her understanding of the legal situation in her case (including the appointment of a litigation guardian), Ms [Rere] replied that she did not understand what her lawyer was doing in court and she was not clear as to the role of a litigation guardian.
- (j) He was unable to reconcile Ms [Rere]'s observed partial incapacity during the interview with the detail and complexity of her affidavit evidence.
- (k) His observations of her capacity were more in keeping with Mr Hayes reported experience in November 2020 than with her apparent capacity demonstrated in her earlier affidavits.

[10] The applicant was herself called and cross-examined. Her answers to Mr Jefferson's questions clarified that she was able to:

- (a) Explain that she wanted a share of "the revenue from the house sale";
and
- (b) That this was because she had been living together with [Ralph] for 30 years; and
- (c) That she had read her affidavits before signing them and that they were true; and

- (d) When questioned about the various (named) witnesses giving evidence against her, she was readily able to describe the relationships those persons had with [Ralph];
- (e) Confirm Legal Aid was paying her legal fees;
- (f) Was only able to initially respond with a “mmm” when asked *Do you ask him [her lawyer] questions, do you say to him “Why am I doing this” or “What’s this about” or “What should I do next?” Is that the sort of thing you do with him?*²

[11] In answer to questions from Ms Libbey for the executor:

- (a) She thought [Ralph] had left “just all the furniture” to her.
- (b) She confirmed there was nothing else.
- (c) She denied knowing that a third of the residue of his estate was held in trust for her.

[12] When answering my (leading) questions about the monies held on trust for her (during her lifetime) and her worries about [Ralph]’s daughter, [Michelle], managing this, she replied: “Yeah, no I trust her, yeah she can – I trust her yeah, I trust her as my trustee, so I’ve got no qualms there.”

[13] In re-examination, Mr Hayes asked her what she meant when she said she trusted [Michelle] as her trustee. Her answer was: “Because I trust her.” When this was further explored with her, the notes of evidence record:³

- Q. ...In what ways do you trust her? What sort of things do you trust her about?
- A. Money.

² Notes of Evidence (NOE), page 18, line 9-26-29.

³ NOE, page 21, lines 10-18.

Q. So how do you see that operating, how would you trust her, what sort of thing would you trust her to do with money?

A. To strike a deal.

Q. Tell me more about that.

A. To give me so much per week for – to give me so much a week for food, so much a week.

[14] Later, she confirmed that she had been told what a litigation guardian does, but she denied knowing what a litigation guardian would do if appointed.

[15] I find that Ms [Rere]’s answers to the various questions strongly support the finding that she is unable to understand and/or articulate the complexities involved in her claims against the estate. The same applies to her inability to comprehend or articulate the role of a trustee. She has elsewhere described [Michelle]’s role as trustee in terms of her paying Ms [Rere] \$500 per month.

[16] In her descriptions to her lawyer, the psychiatrist and the court, I find her to be unable to express any adequate understanding of the nature of the litigation, its purpose, its possible outcomes and the litigation risks involved. There is also a repeating pattern of her acknowledging that she has been advised on such matters as the role of a litigation guardian, but she is unable to recall and/or express any understanding of the advice. I am therefore satisfied that even with proper explanation from legal advisers and experts as may occur, she will not be able to exercise any adequate judgment based on that advice. Further, she showed no understanding of the nature of her beneficial interest under the present will and the benefits and limitations of those benefits. She considered that the receipt of \$500 per month would not affect her benefit entitlements. It is unclear how she has formed this view.

Result

[17] The court finds the applicant to be an “incapacitated person” as defined by r 8 of the Family Court Rules 2002.

[18] The court appoints Ms Joan Winifred Davis, of Manukau, Barrister, as the applicant's litigation guardian. This appointment is consented to by Ms Davis and no issue is taken by any other party to her appointment in this role.

Judge TH Druce
Family Court Judge

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In an electronic form, authenticated electronically.